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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable Phyllis J. Hamilton, Judge

MANUEL MAGANA, ON BEHALF OF)	
HIMSELF AND ALL OTHERS)	
SIMILARLY SITUATED,)	
)	
Plaintiff,)	
)	
VS.)	NO. CV 18-03395-PJH
)	
DOORDASH, INC.,)	
)	
Defendant.)	
_____)	

Oakland, California
Wednesday, September 26, 2018

TRANSCRIPT OF PROCEEDINGS

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Official Reporter

Wednesday - September 26, 2018

9:02 a.m.

P R O C E E D I N G S

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THE CLERK: Calling CV 18-3395, Magana vs. DoorDash, Inc.

Counsel, please step forward to the podiums and state your appearances.

MR. LIPSHULTZ: Good morning, Your Honor. Joshua Lipshultz on behalf of defendant DoorDash. I'll switch sides.

THE COURT: Okay. Good morning.

MS. LISS-RIORDAN: Good morning, Your Honor. I'm Shannon Liss-Riordan on behalf of the plaintiff.

THE COURT: All right. Good morning.

MS. EVANGELIS: Good morning, Your Honor. Theane Evangelis on behalf of DoorDash.

THE COURT: Good morning.

We have three motions on. We are going to start first with the Motion to Compel Arbitration and Stay Proceedings.

I did have an opportunity to read the Ninth Circuit's decision that came out yesterday. I know that -- I believe you all submitted a Statement of Recent Decision attaching a copy of that --

MR. LIPSHULTZ: That's right, Your Honor.

THE COURT: -- decision. I did get a filing that I just saw a few minutes ago, plaintiff's response, which isn't

1 permitted by our local rules. I mean, the whole notion of the
2 rule that permits the filing of a Statement of Recent Decision
3 is simply to put before the Court the actual new decision
4 itself without argument, yet you filed a response to it, which
5 isn't contemplated or permitted, so I'm striking that, but of
6 course you can make whatever argument you wish today in
7 response to the filing of that decision.

8 So looking at -- we're going to start first with the
9 Motion to Compel Arbitration as that motion was filed, I
10 believe -- I forget.

11 **MR. LIPSHULTZ:** July 12th, Your Honor.

12 **THE COURT:** July 12. That was the first motion filed
13 so we'll start with it.

14 I have read the decision. It certainly has an impact on
15 some of the arguments that are raised here, but I want to give
16 you an opportunity to either try to distinguish the case or to
17 tell me why it doesn't apply.

18 This is your motion?

19 **MR. LIPSHULTZ:** That's correct, Your Honor.

20 **THE COURT:** Go ahead.

21 **MR. LIPSHULTZ:** Well, Your Honor, this case belongs in
22 arbitration. Every court to have considered DoorDash's
23 agreement, arbitration agreement and class waiver, has enforced
24 them, including cases brought by the same counsel representing
25 Mr. Magana here today.

1 It's a voluntarily agreement. Plaintiff could have opted
2 out of the agreement but did not, and it, frankly, has a lot of
3 provisions in the agreement that are quite worker-friendly.
4 DoorDash, in fact, pays for the entire arbitration.

5 Plaintiff's counsel herself has invoked the same
6 arbitration agreement more than a dozen times to bring the same
7 claims on behalf of other individuals against DoorDash, and
8 there is no reason not to enforce it here.

9 The argument -- the primary argument for not enforcing it
10 here raised by the other side was the FAA Section 1 exemption,
11 arguing that Mr. Magana is a transportation worker and is
12 therefore exempt from the FAA under Section 1, but, again,
13 every court to have considered that question in the context of
14 a local delivery driver has rejected it, including this court.

15 The United States Supreme Court in the *Circuit City*
16 decision explained that the Section 1 exemption must be given a
17 narrow construction. It covers railway workers, ship workers,
18 airline workers, people who are truly involved in the
19 interstate transportation of cargo.

20 Every court that has looked at pizza delivery drivers
21 or other local food --

22 **THE COURT:** Wouldn't it apply to DoorDash Dashers if
23 they were engaged in the interstate transportation of meals?

24 **MR. LIPSHULTZ:** No, Your Honor, it would not. Under
25 this court's *Vargas* decision, Judge Tigar, just two years ago,

1 analyzed the same factual context and explained that it applies
2 only to the types of workers that are engaged in the interstate
3 transportation of cargo, things that function as sort of the
4 backbone of the economy: Railway workers, ship workers.

5 This court had another decision in the *Levin vs. Caviar*
6 case brought by the same counsel making the same arguments, and
7 it rejected it there as well. Same context: Food delivery
8 driver. These are not -- these are restaurant-prepared meals
9 that then go to customers. They're not goods that are
10 transported in the interstate highway system or the interstate
11 rail system.

12 And so even in cases where there have been drivers who
13 have crossed interstate lines, ancillary to their job -- in
14 other words, maybe a pizza delivery driver in New York City
15 delivers a pizza to New Jersey -- that has been found not to
16 satisfy the Section 1 exemption.

17 And the Supreme Court has explained that the exemption is
18 to be given a very narrow construction. That's in the *Circuit*
19 *City* decision. And no court has found that it has applied in
20 this context or the context of a company like DoorDash.

21 That is really the only argument that plaintiff has for
22 avoiding the arbitration agreement. There was this *Bickerstaff*
23 argument that Your Honor referenced about the Georgia Supreme
24 Court case that allowed people to opt out on behalf of each
25 other. The Ninth Circuit yesterday rejected that argument and

1 there is, I believe, no further position from counsel here that
2 that argument is valid, other than that she tends to seek *en banc*
3 review.

4 **THE COURT:** Okay. All right.

5 Response?

6 **MS. LISS-RIORDAN:** Yes. Thank you, Your Honor.

7 So, yes, I do recognize that the Ninth Circuit yesterday
8 ruled on the *Bickerstaff* argument, so we recognize that this
9 Court is now bound by that.

10 My request is -- and I will address the transportation
11 worker exemption argument and there is also the public
12 injunction argument, but if the Court were to disagree with me
13 on all of these arguments, I would request that the Court
14 dismiss the case so that I could take that up as opposed to
15 stay it, and I cited -- I understand that Your Honor has
16 stricken what I filed yesterday, but what I noted and what I'll
17 just note now is that courts, when faced with Motions to Compel
18 Arbitration and the plaintiff wishes to appeal a decision,
19 courts have the discretion to dismiss rather than stay so that
20 the issue can be taken up on appeal.

21 And there's a recent case of *Gonzalez vs. Coverall* -- I
22 can get the cite for you -- where a court in the Central
23 District of California did just that, granted, in fact, a
24 plaintiff's Motion to Dismiss a case after having compelled
25 arbitration so it could go up on appeal.

1 The *Bickerstaff* ruling by the Ninth Circuit yesterday, I
2 recognize it's binding authority on this Court. I think the
3 decision was -- gave the argument very short shrift.

4 **THE COURT:** What kind of shrift would you expect a
5 court in the Ninth Circuit, particularly the Ninth Circuit, to
6 give to a Georgia Supreme Court decision based upon state
7 contract law and not the Federal Arbitration Act?

8 **MS. LISS-RIORDAN:** Yes. Well, it was based on state
9 law, but it cited to Federal Rule 23 decisions and was, of
10 course, well aware of the Federal Arbitration Act.

11 So I'm not asking this Court to go against what the Ninth
12 Circuit did yesterday, certainly. I'm just --

13 **THE COURT:** But even in the absence of the Ninth
14 Circuit's decision yesterday --

15 **MS. LISS-RIORDAN:** Yes.

16 **THE COURT:** -- when I read the argument last -- in
17 fact, the case I had on my docket last week raised the same
18 issue, and I think this is about the third time. I have still
19 not seen anything cited by either you or any of the other
20 lawyers who have been advancing this argument that would
21 persuade me that a Georgia Supreme Court case based upon
22 Georgia contract law and not referring to the Federal
23 Arbitration Act would be persuasive authority here in the
24 Northern District of California, even without the Ninth
25 Circuit.

1 **MS. LISS-RIORDAN:** Right. So I understand,
2 Your Honor.

3 So my point is that the logic that was used there, again,
4 it was based on Federal Rule 23 and it was in the context of a
5 Motion to Compel Arbitration. So obviously the Federal
6 Arbitration Act applied, even if it was not directly addressed
7 by the court.

8 And the -- because there's not any material difference
9 between the Georgia class certification rule, which is
10 equivalent to Rule -- Federal Rule 23 because the Georgia court
11 cited to Federal Rule 23 decisions, my argument is that it
12 would be persuasive. And I understand it didn't persuade the
13 panel yesterday, but I am simply saying this is a serious
14 argument. Obviously you're seeing it repeatedly. At some
15 point, it should be given full consideration, and that's why I
16 would seek ultimately to obtain *en banc* review.

17 It may be in the case that was decided yesterday. It
18 could be in this case. It could be in another case. So I'm
19 only putting that before you just to state we have put forth
20 what I believe to be an argument that merits further discussion
21 and consideration by an appellate court.

22 So all I'm asking is that if you disagree with my other
23 two arguments, which I'm about to make, that you dismiss this
24 case rather than stay it so that I can attempt to make that
25 argument on appeal, which this Court has the discretion to do.

1 And I can -- if you would allow me to submit the cites, I
2 could. I don't have them in front of me, but they were in my
3 filing yesterday.

4 But that's my argument that I have to make with respect to
5 *Bickerstaff*.

6 Now, could I move on to the --

7 **MR. LIPSHULTZ:** Can I just address this stay versus
8 dismissal point, or do you want me to do that at the end?

9 **THE COURT:** No. You can do it.

10 **MR. LIPSHULTZ:** 9 U.S.C. 3 does not permit dismissal
11 of this case because 9 U.S.C. 3 says that if one party moves to
12 compel arbitration and requests a stay of the action pending
13 arbitration, the court, quote, "shall stay the action."

14 There is not any room for discretion, respectfully, for
15 this Court to dismiss the action. In fact, orders granting --

16 **THE COURT:** I don't believe I've ever dismissed a case
17 that I referred to arbitration.

18 **MR. LIPSHULTZ:** No. Because orders granting
19 arbitration are not appealable and expressly under the FAA.
20 Orders denying motions to compel arbitration are appealable as
21 a matter of interlocutory review. Orders granting arbitration
22 are not appealable. That's a specific design of the FAA to
23 prevent exactly what is happening here, an attempt to draw out
24 a litigation process where the parties should be in
25 arbitration.

1 So respectfully I disagree with counsel on the dismissal
2 point.

3 **MS. LISS-RIORDAN:** And respectfully, Your Honor, the
4 case law specifically says that an order compelling arbitration
5 is not appealable if the court enters a stay, but it is
6 appealable if the court enters a dismissal. And the Supreme
7 Court has allowed that, and like I said, a recent case in the
8 Central District has allowed it also. And I -- I can give you
9 the cite, if you give me one second.

10 **THE COURT:** If it's a matter of the court's
11 discretion, then why should I do it?

12 **MS. LISS-RIORDAN:** Well, first, I'm hoping that you
13 will agree with me on one of my other two arguments, but if you
14 disagree with me on the other two arguments, it's because a
15 serious issue is being raised here, which, as I just described,
16 I think needs further consideration potentially by an *en banc*
17 panel -- I mean -- I'm sorry -- potentially by the *en banc*
18 Ninth Circuit in reviewing --

19 **THE COURT:** How would you describe the serious issue
20 that you are presenting?

21 **MS. LISS-RIORDAN:** On the *Bickerstaff* argument? The
22 serious issue is that we all know that the United States
23 Supreme Court has very drastically and seriously been limiting
24 ability of workers and other types of plaintiffs to band
25 together and bring class actions in court through the use of

1 arbitration clauses. We all know that.

2 But those decisions are not unlimited. It does not mean
3 that every single argument in favor of arbitration is going to
4 be granted. It is extremely important -- it's a matter, I
5 would say, of great public importance and great importance to
6 the entire employment bar, consumer bar, as to whether or not
7 there really are almost no options left to bring class actions
8 in order to vindicate rights such as the rights that are
9 pressed in this lawsuit.

10 So there is a very serious issue that -- the whole point
11 of a class action -- the whole point of the --

12 **THE COURT:** I just don't fully understand the argument
13 in the context of this case.

14 **MS. LISS-RIORDAN:** Yes.

15 **THE COURT:** In this case, your client on not one but
16 two occasions agreed to arbitration years ago.

17 **MS. LISS-RIORDAN:** Yes.

18 **THE COURT:** First in 2014 he signed the arbitration
19 agreement, and then in 2016 he reaffirms that by using the
20 mobile app. So for the last four years, your client has been
21 subject to arbitration and did so voluntarily -- did so
22 voluntarily when he was given the option to opt out. All
23 right.

24 So I don't quite understand why this case raises the
25 issues. Your client is bound by arbitration, voluntarily

1 agreed to do so, and the whole notion that you could
2 potentially add someone who has opted out who would bind all
3 the people who have signed and been bound by an arbitration
4 agreement for years -- I don't understand that argument.

5 **MS. LISS-RIORDAN:** Okay. So if I can explain,
6 Your Honor, in the *Bickerstaff* case, the -- it was the exact
7 situation that was presented. There was an individual who
8 rejected arbitration, and the Georgia Supreme Court decided --
9 and then the U.S. Supreme Court denied cert of the decision,
10 but the Georgia Supreme Court decided that the whole point of a
11 class action is to have someone who is interested in the issue
12 and is taking action on behalf of others who are not going to
13 act on their own behalf and that when the lead plaintiff --

14 **THE COURT:** So why --

15 **MS. LISS-RIORDAN:** -- rejected arbitration --

16 **THE COURT:** -- why shouldn't that be Mr. Roussel who
17 you seek to add? Why can't Mr. Roussel have his own case in
18 which he is acting on behalf of people similarly situated to
19 him in that they opted out of the agreement?

20 **MS. LISS-RIORDAN:** So in the *Bickerstaff* case, the
21 plaintiff, who rejected arbitration, was deemed by the Court to
22 have done so on behalf of the class he sought to represent, but
23 not automatically. He was not held to have bound all of those
24 class members.

25 What the Court said was that he could proceed with his

1 case, and if he ultimately was successful in obtaining class
2 certification, then the class would receive, in the ordinary
3 course, notice of the action and the opportunity to decide
4 whether to follow his lead in having rejected arbitration by
5 staying in the class, or alternatively if they would prefer not
6 to and if they would prefer making an intelligent decision to
7 stick with arbitration, they could opt out of the class. So
8 that was the exact situation --

9 **THE COURT:** In this case, however, there was a 30-day
10 opt-out period, which your client missed by four years. And I
11 would not -- I would not find in this case that he could
12 retroactively opt out of a case, out of an arbitration
13 agreement, that he had not only signed four years ago, but had
14 obviously complied with over the course of four years.

15 **MS. LISS-RIORDAN:** And that is exactly the situation
16 in the *Bickerstaff* case --

17 **THE COURT:** I'm not going to follow *Bickerstaff*.

18 **MS. LISS-RIORDAN:** I completely recognize that.

19 **THE COURT:** I'm not persuaded by it at all.

20 **MS. LISS-RIORDAN:** I understand. I completely --

21 **THE COURT:** Do you have any arguments based on any
22 reasoning other than *Bickerstaff*, because that's not going to
23 change my mind?

24 **MS. LISS-RIORDAN:** Yes. I absolutely agree this Court
25 must follow *Bickerstaff*. I'm simply explaining why, because

1 you asked me why is there an issue that plaintiff should be
2 able to pursue further on appeal, and that goes to the Court's
3 discretion as to whether to dismiss or to stay if you disagree
4 with our arguments, opposing arbitration.

5 **THE COURT:** Is your response then that your
6 *Bickerstaff*-related argument is all you have?

7 **MS. LISS-RIORDAN:** Well, that's the first argument.
8 Now, I also have transportation worker and public injunction,
9 which I can turn to now if --

10 **THE COURT:** Okay. Why don't you do that because I'm
11 not going to be moved by *Bickerstaff*.

12 **MS. LISS-RIORDAN:** I completely understand that.

13 So, Your Honor, the second argument is the transportation
14 worker exemption to the FAA. That is Section 1 of the FAA.
15 And there are -- in order to fall under this exemption,
16 plaintiffs have to be subject to contracts of employment and be
17 engaged in the transportation of goods in interstate commerce.

18 So let me talk about those three pieces of this.

19 So first off, on the contract of employment, as I noted in
20 the briefs, there are two ways to go here. There is the way
21 that the First Circuit went -- well, let me put that to the
22 side because we're in the Ninth Circuit.

23 What the Ninth Circuit said in the *Van Dusen* case is that
24 the court is required to make an antecedent determination as to
25 whether or not workers are employees and thus worked under

1 contracts of employment. And so that's what the Ninth Circuit
2 said.

3 The First Circuit, which in the *Oliveira vs. New Prime*
4 case, a case that is being heard this coming term by the U.S.
5 Supreme Court, the First Circuit said that antecedent
6 determination doesn't even need to be made because both
7 employees and independent contractors qualify as operating
8 under contracts of employment. There is no need to even get to
9 that question. And the Supreme Court is going to be reviewing
10 that decision.

11 And so what I had posed, though, is that here in the Ninth
12 Circuit, the Ninth Circuit hasn't adopted that more liberal
13 framework that the First Circuit has, so there is no need to
14 wait to see what the Supreme Court says about the First
15 Circuit's methodology here.

16 In the Ninth Circuit, it would be incumbent on the Court
17 to make, as it was required to do in the *Van Dusen* case, this
18 preliminary antecedent determination as to whether the workers
19 are employees.

20 And what happened in the *Swift* case was the court did
21 that, essentially on a summary judgment standard. There was
22 discovery. There was summary judgment -- there was summary
23 judgment briefing.

24 And in this case, as we pointed out under the California
25 Supreme Court's recent decision of *Dynamex*, I really think

1 there can be no question that the plaintiffs are employees.
2 But that's all just part one of the transportation worker
3 exemption.

4 Part two of the transportation worker exemption is whether
5 or not --

6 **THE COURT:** Excuse me. Isn't the ultimate question in
7 the case whether or not -- I mean, this is a case about
8 misclassification; correct?

9 **MS. LISS-RIORDAN:** Yes, it is.

10 **THE COURT:** So you're asking the Court to make some
11 kind of *prima facie* determination that you've met the standards
12 and can prove your case --

13 **MS. LISS-RIORDAN:** Yes, which --

14 **THE COURT:** -- at the beginning of the case?

15 **MS. LISS-RIORDAN:** Which is exactly what the Ninth
16 Circuit said the district court has to do in the *Van Dusen*
17 case, that's correct.

18 **THE COURT:** All right. But you're not asking for an
19 ultimate determination --

20 **MS. LISS-RIORDAN:** No. It's a preliminary -- it's a
21 preliminary determination. They call it an antecedent
22 determination. It's just a threshold issue. It's not the
23 ultimate issue.

24 **THE COURT:** Okay.

25 **MS. LISS-RIORDAN:** So on -- the second question is as

1 to whether or not the drivers here, the plaintiffs here, are
2 engaged in transporting -- transportation work. I think there
3 can be no question that they're engaged in transportation work.
4 That's what they do, is they drive. They deliver food and
5 meals from restaurants to customers at their homes. They're
6 clearly transportation workers.

7 Now, the defendant cites to various cases such as cases
8 that held that pizza delivery drivers, for instance, are not
9 transportation workers. The difference with that kind of case
10 is that -- and the Courts have looked at a number of factors.
11 There is the *Lenz* case, which is an Eighth Circuit case, which
12 we've cited which sets forth a number of factors the courts are
13 to look at in determining whether or not a worker is a
14 transportation worker under this exemption.

15 But one of the factors you look at also is whether the
16 company as a whole is engaged in transportation. So a pizza
17 delivery driver is working for a pizza restaurant, which
18 clearly is not a transportation company. But the fact where
19 here you have drivers who are working for a company whose very
20 business is to provide transportation is a different story.
21 And so these drivers, I think it could not be denied, are
22 involved in transportation. That's what they do.

23 And, in fact, the cases under the transportation worker
24 exemption have been so broad as to say that even workers who
25 are not themselves the ones doing the transportation but are

1 working for a transportation company would fall under the
2 exemption, such as managers or supervisors who don't even do
3 the driving themselves. But here the plaintiffs are actual
4 drivers themselves.

5 Now, I think the third issue under the transportation
6 worker exemption is the most interesting. So let me talk about
7 that. And that is the question about whether the
8 transportation is in interstate commerce.

9 So what defense counsel just referred to is the question
10 about whether the drivers themselves are crossing state lines.
11 The case law is clear that the drivers themselves don't need to
12 be crossing state lines in order to qualify as being engaged in
13 transportation services and interstate commerce.

14 The question is whether what they're delivering crosses
15 state lines. And there can be no doubt that food products that
16 are brought to restaurants and prepared in restaurants and then
17 delivered to customers, these food products come from all over
18 the country; all over the world, perhaps.

19 And also the case law as we've cited makes clear --

20 **THE COURT:** Potentially. Potentially.

21 **MS. LISS-RIORDAN:** Well, there can be discovery, if
22 necessary, but I think it can really hardly be denied that
23 restaurants all throughout California are not solely preparing
24 and delivering food that was manufactured or grown in
25 California.

1 The case law makes clear that the -- not all -- not all
2 the products have to cross state lines, only some of them. If
3 even some of them do, that still qualifies as interstate
4 commerce.

5 But here is the most interesting part of the issue. The
6 issue is whether or not the journey of these food products in
7 interstate commerce -- whether the journey ends at the
8 restaurant because they are transformed into prepared meals
9 that are delivered to their -- to the customers, to their
10 homes. And that's where it gets very interesting, and we've
11 cited a series of cases involving milk products. For some
12 reason, this issue just came up a bunch in the milk industry.

13 And the courts actually looked at the question of how much
14 processing went into -- whether the delivery of these milk
15 goods were in interstate commerce came down to the question of
16 how much processing happened at that point from which they were
17 delivered so if -- in other words, if there was little -- if
18 there was little processing, then they were still continuing on
19 their interstate journey from wherever they came from to the
20 place where they were -- where they were delivered from in
21 state versus if there was a lot of processing, then the court
22 said well, then it looks like their interstate journey came to
23 a halt.

24 So what I would submit is that restaurants throughout
25 California for which these DoorDash drivers are delivering

1 their food -- there are different types, I think it can just be
2 understood, but we can develop a factual record, if necessary,
3 that these different foods are of the type, some of which are
4 processed -- they're fully cooked meals -- and some of which
5 are not. There are soda -- sodas that come from out of state.
6 There are bags of chips that come from out of state and those
7 aren't processed at the restaurant.

8 And, again, it doesn't need to be all of the food products
9 that are interstate but even just some of them are interstate.
10 That qualifies as interstate commerce, and I've cited that case
11 for you as well in the briefing.

12 So now defense counsel relies on the -- a district court
13 decision in this court that rejected this argument. I made
14 this argument to Judge Laporte in the *Levin vs. Caviar* case,
15 and she rejected the argument. She essentially compared the
16 drivers to the pizza delivery drivers but, I would submit, did
17 not go into the level of analysis that I'm explaining to you,
18 and I don't think she was correct --

19 **THE COURT:** How do you distinguish them from pizza
20 delivery drivers who are indeed delivering food, which is what
21 I think Dashers do; right?

22 **MS. LISS-RIORDAN:** Right. Okay. Because if you look
23 at the *Lenz* case, for example, which sets forth the factors,
24 you don't have to make it on every factor. There is sort of a
25 balancing that the courts do of these various factors. And the

1 fact that the pizza delivery drivers worked for a company that
2 was clearly not a transportation company, it was a pizza
3 restaurant, whereas here we are talking about a company that
4 the very essence of the company is itself to be a
5 transportation company, so that is -- that is the distinction.
6 That's why just simply relying on these pizza delivery cases, I
7 submit, was not correct.

8 And in the *Levin vs. Caviar* case, I appealed that to the
9 Ninth Circuit. The case then settled on a class-wide basis
10 before it could be heard so the appeal was withdrawn.

11 So I agree that there is another district court in this
12 court that has rejected the argument. I submit that it did not
13 consider this argument as closely as I am trying to present to
14 you here.

15 And the same argument I'll note that I'm presenting here
16 is also pending in another case against DoorDash that I have
17 filed in the District of Massachusetts, and that case was
18 argued in May, and we're awaiting a decision from the court
19 there on the exact same issues that are here.

20 These are obviously serious issues, given the fact that
21 the Supreme Court has limited the ability of workers so
22 strongly from bringing class actions. I think it is incumbent
23 on the courts to look very closely on these arguments that
24 could allow workers to band together so as to actually enforce
25 these wage law rights.

1 Now, if I could -- I could turn to my third argument,
2 unless you have any other further questions on the
3 transportation worker argument.

4 **THE COURT:** No.

5 **MS. LISS-RIORDAN:** So the third argument is the
6 argument that DoorDash cannot compel arbitration of plaintiff's
7 claim for an injunction in this case, which is essentially a
8 public injunction, an injunction of extreme importance to the
9 public. And in the *McGill* case --

10 **THE COURT:** How is it of extreme importance to anyone
11 other than your client and the putative class?

12 **MS. LISS-RIORDAN:** It is -- I'll tell you exactly why.
13 The California Supreme Court made that loud and clear on
14 April 30th when it issued its recent decision in *Dynamex*. In
15 an 82-page unanimous decision, the California Supreme Court
16 explained why proper classification of workers is of such
17 importance, not just to those workers themselves, but to the
18 public at large, and it spelled it out, and we've quoted it in
19 our brief. That the court looked at the fact that when
20 companies misclassify their workers as independent contractors,
21 they not only deny those workers their rights under the Labor
22 Code and other employment laws, but they hurt complying
23 competitors, which makes it extremely difficult for companies
24 who are trying to comply with these laws to compete, and they
25 hurt the public, including the public government -- state

1 government, federal government, who are deprived of funds both
2 in the form of taxes that are placed on employment, but also
3 because workers who are deprived of these rights often are not
4 able to support themselves and have to rely on public
5 assistance.

6 So the California Supreme Court made loud and clear that
7 these are issues that are of public importance. And what the
8 *McGill* case from the California Supreme Court said just last
9 year is that issues of public importance -- a plaintiff coming
10 into court seeking an injunction that is of public importance
11 cannot be compelled to arbitration where that relief could not
12 be obtained in arbitration.

13 **THE COURT:** Why couldn't it be obtained in
14 arbitration?

15 **MS. LISS-RIORDAN:** Because DoorDash's arbitration
16 clause is very specific that any claims brought in arbitration
17 cannot be on a class collective or representative basis. I am
18 positive that DoorDash would argue in arbitration that that
19 phrase prevents a plaintiff, who is pursuing an arbitration,
20 from bringing a claim -- seeking relief that would affect
21 anyone other than himself. And that's what *McGill* looked at.

22 **THE COURT:** Do you have case authority that
23 establishes that a plaintiff seeking a public injunction is
24 essentially tantamount to a class representative or collective
25 action?

1 **MS. LISS-RIORDAN:** Well, it's more like a
2 representative action. It's similar to a PAGA case, and the
3 California Supreme Court and the Ninth Circuit have held that
4 PAGA claims cannot be compelled to arbitration. Representative
5 claims have to be allowed to proceed and that is not preempted
6 by the FAA.

7 So this is a similar doctrine that the California Supreme
8 Court has established in *McGill*.

9 **THE COURT:** So your argument is that a plaintiff
10 seeking a public injunction is essentially -- should be
11 compared to a plaintiff seeking to represent a PAGA class?

12 **MS. LISS-RIORDAN:** Yes. It's akin to a representative
13 action because the plaintiff is seeking an order prohibiting
14 the company from engaging in this conduct generally, not simply
15 to himself, but generally that the -- the wage laws, the Labor
16 Code must be complied with with respect to the workers at large
17 and not just himself. And that's why it's akin to a
18 representative action.

19 And because DoorDash's arbitration agreement is so
20 specific that in arbitration, a worker can only bring an
21 individual claim, that that agreement would not allow seeking a
22 public injunction in arbitration.

23 **THE COURT:** Okay.

24 **MS. LISS-RIORDAN:** If DoorDash were to say otherwise
25 and say of course that claim could be brought in arbitration,

1 then I might pursue it in one of the arbitrations that I have
2 filed in the alternative, which, of course, does not in any way
3 show that the arbitration clause is enforceable simply because
4 some of my clients have attempted to avail themselves of
5 arbitration.

6 But if DoorDash were to state here on the record openly
7 that it would not try to impede in any way workers from
8 bringing public injunction claims in arbitration, then maybe
9 they can, but under the terms of the agreement, it seems pretty
10 clear that DoorDash will argue that they cannot.

11 **THE COURT:** Okay. All right. Is that it?

12 **MS. LISS-RIORDAN:** Unless the Court has any more
13 questions, I believe that's it.

14 **THE COURT:** All right. Response?

15 **MR. LIPSHULTZ:** On the FAA Section 1 exemption, I
16 think the questions that opposing counsel described are
17 interesting; may have been interesting at one time, but the
18 U.S. Supreme Court has already rejected them in 2001.

19 The *Circuit City* decision by the U.S. Supreme Court
20 explains that the Section 1 exemption must be construed
21 narrowly and only to workers who are in a position akin to
22 railroad workers and shipmen, seamen. And this court --

23 **THE COURT:** What is your response to plaintiff's
24 counsel's argument with regard to the need for the Court to
25 consider the nature of the company as opposed to the individual

1 workers?

2 **MR. LIPSHULTZ:** Well, again, as this Court explained
3 in the *Vargas* decision, quoting *Circuit City*, transportation
4 workers are, quote, "workers" -- this is a quote from *Circuit*
5 *City* -- "workers actually engaged in the movement of goods in
6 interstate commerce."

7 So, again, that has been rejected by the U.S. Supreme
8 Court. The worker has to be engaged in moving goods in
9 interstate commerce.

10 Paragraph 3 of the plaintiff's Complaint makes clear that
11 he's not. He's a worker in San Jose.

12 **THE COURT:** So even if someone worked for a railway or
13 for FedEx or for a company for which there is no dispute it's a
14 transportation company, that person was a clerical worker and
15 not actually driving a truck, it wouldn't apply?

16 **MR. LIPSHULTZ:** I think that's right. The U.S.
17 Supreme Court hasn't ruled on that fact pattern necessarily,
18 and that fact pattern is obviously not presented here, but I
19 think that's correct.

20 And it's not just the pizza delivery case that has come
21 out the other way. It's every case. It's *Levin vs. Caviar*
22 that counsel argued was -- Caviar is a company just like
23 DoorDash, a technology company.

24 By the way, DoorDash is not a transportation company.
25 It's a technology company. It operates a technology platform

1 that people use to move meals from restaurant to worker -- to
2 consumer.

3 **THE COURT:** I don't believe there has been any
4 definitive ruling from a circuit on that.

5 **MR. LIPSHULTZ:** No. And Your Honor doesn't need to
6 reach those questions here.

7 The point is simply that the arguments counsel has been
8 making here today that she describes as interesting are on some
9 level theoretically interesting, but they have all been
10 unfortunately rejected by the U.S. Supreme Court. The Eleventh
11 Circuit in the *Hill vs. Rent-A-Center* decision is another case
12 that rejected this argument.

13 And the cases that counsel points to in her brief to
14 support her argument are completely different cases. The
15 primary case she relies on is this *Palcko* case from the Third
16 Circuit. There the company was Airborne Express. It was
17 literally a company whose business is to transport goods by air
18 internationally and interstate.

19 So they are just not on point with the case here. Every
20 case on point has gone the other way.

21 On the public injunction question --

22 **MS. LISS-RIORDAN:** May I just respond briefly before
23 he addresses public injunction?

24 **THE COURT:** No. Let him finish. You did both issues;
25 he gets to do both issues.

1 **MR. LIPSHULTZ:** On the public injunction question, the
2 rule that counsel refers to as -- the *McGill* case from the
3 California Supreme Court talks about cases in which courts --
4 companies have prevented public injunction claims from being
5 brought anywhere where you have waived your right to bring a
6 public injunction claim anywhere, and they have said that those
7 waivers may not comport with California public policy.

8 The rule that counsel is actually relying on which says
9 that you can't have an arbitration agreement forcing claim --
10 forcing these types of claims to arbitration is actually the
11 Broughton-Cruz Rule, and the Ninth Circuit actually rejected
12 that rule in the *Ferguson* case. It said that that rule is
13 preempted by the FAA, which, of course, it is.

14 Any argument that you can't arbitrate any particular type
15 of claim is squarely preempted by the FAA. The FAA insists, as
16 the Supreme Court has said many times, that you have to be able
17 to agree to arbitrate any type of claims that you wish on a
18 bilateral basis. That's *Italian Colors*, it's *Concepcion*, it's
19 case after case after case, and *Epic Systems* just last year.

20 So these arguments again have been fairly rejected by the
21 U.S. Supreme Court. And the notion that her client,
22 Mr. Magana, would have standing to pursue an injunction on
23 behalf of anyone other than himself is really something that
24 doesn't make a lot of sense to me, and I think we would have
25 serious problems with a standing argument in that regard.

1 But, in any event, whether or not his public injunctive
2 claim -- which, by the way, he doesn't have a public injunctive
3 claim. As Your Honor pointed out, he has a claim for
4 injunctive relief only on behalf of a small group of people,
5 namely, who do work on the DoorDash platform. So it's not a
6 public injunctive claim.

7 But even if he did, whether or not --

8 **THE COURT:** It's not really a claim, is it?

9 **MR. LIPSHULTZ:** It's not a claim at all. It's a form
10 of relief that is he is seeking -- by the way, it's not even in
11 the Complaint. Counsel is trying to amend it into the
12 Complaint, which is another problem with it.

13 **THE COURT:** It's not one of the five causes of
14 action --

15 **MR. LIPSHULTZ:** No.

16 **THE COURT:** -- which is why I don't quite understand
17 why we are referring to it as a claim.

18 Is it a form of relief that is sought in the prayer in the
19 Complaint? I don't --

20 **MR. LIPSHULTZ:** Not expressly in the original
21 Complaint. In the proposed Amended Complaint, that I'm sure
22 we'll talk about in a few minutes, counsel tries to reframe the
23 relief sought as a public injunctive relief claim, even though
24 it's not. It's only on behalf of, again, people like
25 Mr. Magana who have done work on the DoorDash platform.

1 So it's -- it's not a public injunctive relief claim, and
2 any --

3 **THE COURT:** We are still talking about the Motion to
4 Arbitrate, which was filed in July, and there was no public
5 injunctive relief claim in the operative Complaint that was
6 filed when the motion was filed.

7 **MR. LIPSHULTZ:** That's correct.

8 **THE COURT:** So I'm not even sure why we're talking
9 about it.

10 **MR. LIPSHULTZ:** That's correct.

11 **THE COURT:** In any event, I have heard enough about
12 it. We still have two other motions, and we're going to move
13 on.

14 **MS. LISS-RIORDAN:** I can't respond very briefly?

15 **THE COURT:** No. It's their motion. They get to have
16 the last word on it. On your motions, you can have the last
17 word.

18 The next motion is the Motion for Leave to File an Amended
19 Complaint. That's your motion. You get to go first and last.

20 **MS. LISS-RIORDAN:** Thank you, Your Honor.

21 **THE COURT:** Is there anything you want to say?

22 **MS. LISS-RIORDAN:** Yes, Your Honor.

23 So plaintiff filed this Motion to Amend the Complaint
24 just, I believe, one week after what would have been 21 days
25 since the Motion to Compel Arbitration was pending.

1 Courts routinely allow early amendment. Courts often
2 allow amendments even much latter in a case.

3 Judge Chhabria, addressing the exact same situation just
4 last week, said that a Motion to Compel Arbitration is not a
5 responsive pleading, and thus a plaintiff was allowed to amend
6 a Complaint to add another plaintiff, even after that 21 days
7 had elapsed, and I submitted that as a Notice of Supplemental
8 Authority.

9 So --

10 **THE COURT:** Well, DoorDash is -- let's -- wait. We
11 jumped over the procedural problem.

12 The Statement of Supplemental Authority you filed,
13 purportedly pursuant to local 7-3(d), which is the only rule
14 that allows a filing after the reply brief has been filed --
15 and you filed that, and I believe you relied upon two cases,
16 one of which at least had been filed and available for citing
17 when you filed your reply brief.

18 But additionally, you added argument. I don't quite
19 understand why you believe that's appropriate, given that the
20 rule says you simply put the court on notice that there has
21 been this new decision and you added argument and an older
22 decision.

23 Why is it that you think that your supplemental filing
24 shouldn't be stricken?

25 **MS. LISS-RIORDAN:** I apologize, Your Honor. Some

1 courts have allowed brief argument with a supplemental --
2 Notice of Supplemental Authority. I don't have DoorDash's
3 Notice of Supplemental Authority before me from yesterday, but
4 I had thought that there was some brief argument contained in
5 it as well.

6 I defer to what -- if Your Honor -- if Your Honor is going
7 to strike the notice, I would still ask that the Court take
8 judicial notice of Judge Chhabria's order from September 7th.

9 **THE COURT:** The supplemental filing is stricken, but
10 you can certainly argue the import of Judge Chhabria's
11 decision, if you wish.

12 **MS. LISS-RIORDAN:** Okay. Thank you, Your Honor.

13 So in the *Lawson vs. Deliv, Inc.* case, 18-3632,
14 Judge Chhabria was faced with the exact same situation we have
15 here in which a Complaint was filed, there was a Motion to
16 Compel Arbitration, and then plaintiff filed a Motion to Amend
17 the Complaint to add an additional plaintiff and make other
18 small changes to the Complaint, and Judge Chhabria said that it
19 was not necessary to file a Motion to Amend because an Amended
20 Complaint could be filed as a right because a Motion to Dismiss
21 is not a responsive pleading within the meaning of the rule,
22 and he cited Ninth Circuit authority for that proposition.

23 So I believe there are multiple -- there is really no
24 reason for the Court not to allow this early amendment. There
25 are multiple reasons to allow it. The case is in its infancy.

1 Mr. Roussel, who wishes to join the case as a named plaintiff,
2 he didn't even agree to arbitration, so there is no question
3 that he is not going to have to arbitrate his claim because he
4 expressly opted out of the arbitration clause.

5 So I would submit that the Court should allow the
6 amendment. Even if the Court rejects all of the other
7 arguments that I'm making, he will be able to proceed before
8 this Court.

9 The Motion to Amend was filed --

10 **THE COURT:** I don't quite understand. He is not in
11 the same class. He opted out of the arbitration agreement.
12 Your current client opted into it. I mean, he signed it and
13 agreed to it. Why should they be in the same class?

14 There's some dicta, at least, in the case yesterday and
15 there certainly are other cases that have been brought to my
16 attention which deal with the inadequacy of -- or the
17 inappropriateness of those two categories of plaintiffs
18 belonging in the same class.

19 Why isn't it -- and moreover, given that I'm going to
20 decide the arbitration motion first since it was filed first,
21 this case could very well be in a stay status or it could be
22 dismissed. Why wouldn't it be futile to add him to a case that
23 I'm either staying or dismissing?

24 **MS. LISS-RIORDAN:** Well, because, Your Honor, first of
25 all, it's premature to consider a class certification and

1 who -- who would be an adequate representative where this is
2 simply a Motion to Amend at the outset of a case.

3 Second of all, there could very well be different
4 subclasses, people who did not opt out of the arbitration
5 agreement and people who did.

6 The mere fact that our current plaintiff, Mr. Magana, did
7 not opt out of the arbitration agreement is not a reason why
8 someone who has the exact same claims against the exact same
9 company shouldn't be allowed to be amended into a Complaint at
10 the very beginning, before discovery has begun.

11 The Motion to File the Amended Complaint was filed well
12 before we got here before you at this initial hearing. Courts,
13 as we've noted, have routinely allowed Motions to Amend --

14 **THE COURT:** So if I grant the Motion to Compel
15 Arbitration and stay the case, what's the status of Mr. Roussel
16 if I also permit him to be added in?

17 **MS. LISS-RIORDAN:** Well, his claims wouldn't be able
18 to be stayed because he is not bound by any arbitration
19 agreement so he should be able to proceed with his claims,
20 regardless of what you do with Mr. Magana. And --

21 **THE COURT:** So --

22 **MS. LISS-RIORDAN:** And you don't know -- we don't know
23 yet whether or not there are enough drivers who opted out so
24 that there could even potentially be a class of drivers who,
25 like Mr. Roussel, opted out of arbitration. We haven't done

1 discovery yet. We simply don't know.

2 This is just a Motion to Amend. I feel like defense
3 counsel is trying to jump ahead several steps here to make
4 substantive arguments about whether a class would be
5 appropriate, who would be a class representative.

6 Courts frequently allow -- routinely allow early
7 amendments, even late amendments after -- I have cited cases
8 where courts have allowed amendments of new plaintiffs even
9 years after the case was filed. For example, one of the cases
10 before Judge Chen in the *Uber* litigation, the *Yucesoy vs. Uber*
11 just this spring, Judge Chen allowed amendment of additional
12 lead plaintiffs four years after the case was started because
13 there were additional arguments to be made with respect to
14 them.

15 And in cases in which a lead plaintiff may, for some
16 reason, be deemed not adequate, courts routinely allow the
17 amendment of additional plaintiffs in who might be able to
18 address those arguments.

19 **THE COURT:** Let me get back to what you said. If,
20 indeed, the Motion to Compel Arbitration is granted and if I
21 determine that the action should be stayed, you said that the
22 claim -- if Mr. Roussel is added to the case, that the case
23 couldn't be stayed as to him.

24 **MS. LISS-RIORDAN:** Correct.

25 **THE COURT:** Okay. What is that based on?

1 **MS. LISS-RIORDAN:** Because there's absolutely no basis
2 for him to be compelled to arbitration so there is no reason
3 for -- there is no reason for his claims to be stayed, even if
4 the Court were to stay claims -- claims of other plaintiffs who
5 were bound by arbitration. There is simply no basis that --
6 there is no reason why he can't be allowed to proceed with his
7 claims.

8 **THE COURT:** So you think, then -- you would ask that
9 the Court sort of bifurcate the case and separate out the
10 plaintiffs for which Motions to Compel have been filed but yet
11 go forward with the others?

12 **MS. LISS-RIORDAN:** Yes. That happens all the time.

13 **THE COURT:** Is that --

14 **MS. LISS-RIORDAN:** Yes.

15 **THE COURT:** Is that how you proceed --

16 **MS. LISS-RIORDAN:** Yes. Yes. Of course, we would
17 ask, as I argued earlier, that if you disagree with all of the
18 arguments that I have made with respect to Mr. Magana, that you
19 dismiss him so that we can pursue these issues on appeal.

20 I think, if nothing else, this argument has shown that
21 there are arguments here. I -- I understand the Court may or
22 may not agree with the arguments that I'm presenting, but I
23 would submit that these are important arguments that should be
24 allowed to be addressed, if necessary, on appeal and that would
25 be -- that would be the way to get there, and the Supreme Court

1 has allowed that, has explicitly noted that when cases are
2 dismissed rather than stayed, they can be appealed.

3 And Judge Bernal in the *Gonzalez vs. Coverall* case
4 explicitly granted that request to dismiss a case after he had
5 determined that he must compel arbitration when presented with
6 the same situation. So --

7 **THE COURT:** All right. You need to wrap it up. I
8 have another matter that I need a lot --

9 **MS. LISS-RIORDAN:** We haven't addressed yet my
10 additional motion. Are we --

11 **THE COURT:** Are you finished with the amendment issue?

12 **MS. LISS-RIORDAN:** I believe I'm finished with the
13 amendment issue, yes.

14 **THE COURT:** Brief response?

15 **MR. LIPSHULTZ:** Brief response.

16 This whole plan just makes no sense, Your Honor.
17 Mr. Magana has a claim that needs to go to arbitration. That
18 should be the end of the case. That should be stayed pending
19 the arbitration. That's what the FAA requires, 9 U.S.C. 3, the
20 case shall be stayed.

21 And so how can it be that another plaintiff can come in
22 and try to litigate the same case while the case is stayed
23 pending arbitration? If you look at the Rule 15 motion that
24 counsel filed and the proposed Amended Complaint --

25 **THE COURT:** Are you suggesting that perhaps this is

1 sort of strategy to avoid a stay?

2 **MR. LIPSHULTZ:** I would never suggest that,
3 Your Honor. But I do -- I do think it's worth considering
4 whether it is. I mean, the -- the proposed Amended Complaint
5 that is added -- that is attached to the Rule 15 motion is
6 completely improper. It has both Mr. Magana and Mr. Roussel in
7 it. It asserts a class action on behalf of Mr. Roussel, on
8 behalf of everyone, even though we know that most of the
9 drivers are subject to arbitration agreements.

10 The Ninth Circuit's decision from yesterday again rejects
11 this attempt to bring a class action on behalf of putative
12 class members who are bound by arbitration agreements. It
13 can't happen.

14 And so the Complaint that she's proposing to amend is
15 completely futile and improper, and if Mr. Roussel has
16 individual claims that he wishes to pursue because he opted out
17 of arbitration, if he wants to pursue them in court --

18 **THE COURT:** You are talking way too fast.

19 **MR. LIPSHULTZ:** Sorry, Your Honor. So much to say.

20 If Mr. Roussel has individual claims that he wants to
21 bring in court because he opted out of his arbitration
22 agreement, he can bring his own case. And it's certainly
23 questionable whether the federal -- whether a federal court
24 would have jurisdiction over an individual claim by Mr. Roussel
25 against DoorDash under the California Labor Code.

1 And so allowing her to amend in Mr. Roussel and somehow
2 proceed with his own individual claims while the rest of the
3 case is stayed pending arbitration of Mr. Magana's claims makes
4 absolutely no sense, Your Honor.

5 **THE COURT:** Okay. All right.

6 Brief response?

7 **MS. LISS-RIORDAN:** Yes. Your Honor.

8 So, first of all, I just want to cite for the Court Ninth
9 Circuit authority, *Sparling vs. Hoffman Construction Company*,
10 864 F.2d 635, Ninth Circuit, 1988, said: "Courts have
11 discretion under 9 U.S.C. Section 3 to dismiss or stay claims
12 that are subject to an arbitration agreement."

13 So --

14 **MR. LIPSHULTZ:** If there is not -- I'm sorry.

15 **THE COURT:** Hold on. Do not interrupt.

16 Go ahead.

17 **MS. LISS-RIORDAN:** Okay. And so, again, with respect
18 to Mr. Roussel, it is completely premature for DoorDash just to
19 be saying there is no way he can get a class certified here,
20 and, again, we don't even know. We haven't done any discovery.
21 We don't know how many DoorDash's drivers opted out of
22 arbitration or might have some defenses to arbitration that
23 even he or Mr.-- I'm sorry -- that Mr. Magana doesn't have.
24 It's just premature for a court to determine it at this early
25 juncture.

1 And I just want to cite a case that was decided in the
2 District of Connecticut, I believe, 2011. *D'Antuono vs. V & C*
3 *Holdings*. It was a strip club case involving a strip club
4 called The Gold Club. There was a plaintiff who was not bound
5 by arbitration because the defendant couldn't find an
6 arbitration agreement for her. They claimed that everyone had
7 signed arbitration agreements, but they weren't able to produce
8 an arbitration agreement for her.

9 The district court there held that because there may be
10 individual questions about whether various individuals who had
11 worked there were subject to arbitration or not and the burden
12 was on the defendant to prove that everyone who it said was
13 bound by an arbitration agreement actually had an arbitration
14 agreement, the court allowed the case to go forward and there
15 could be proceedings for those people who might not have
16 arbitration agreements or might have their own defenses to
17 arbitration agreements to join the case.

18 But in this case, this is completely putting the cart
19 before the horse because, again, we have no idea at this
20 juncture how many people rejected arbitration. How many people
21 is DoorDash not going to be able to locate an arbitration
22 agreement for? They want to prevent the early amendment,
23 extremely early amendment of a Complaint, just based on their
24 statement now that no class will be able to be certified, but
25 it would be improper for the Court to determine whether a class

1 could be certified at this juncture, and we haven't even
2 brought a class certification motion yet.

3 And I also just wanted to briefly note that our Motion to
4 Amend also seeks to add the single word "public" to the request
5 for relief for an injunction. The original Complaint, while it
6 did seek an injunction and for the reasons I've described, it
7 is an injunction of a public nature. In the Motion to Amend,
8 we simply requested to add that single word to clarify that it
9 would be of a public nature.

10 So, again, there is -- there is no reason I see that a
11 court could not allow an amendment to a Complaint one week
12 after DoorDash claims that it could have been allowed, but
13 under Judge Chhabria's reasoning, could be allowed without my
14 even having to have brought this motion.

15 So I think that's it on the Motion to Amend.

16 **THE COURT:** Well, you don't get to take advantage of
17 Judge Chhabria's theory because if that were indeed the case,
18 you would have just filed your motion. If you didn't think
19 that you needed leave, why did you ask for leave?

20 **MS. LISS-RIORDAN:** Well, because I thought that I
21 needed it, but then later Judge Chhabria said no, you don't
22 actually need it, so I could attempt to just file it now.

23 **THE COURT:** Well, if his procedures were binding on
24 me, then, yes, but they're not. I think you do need it. You
25 do need leave because you sought leave and because you're

1 beyond the deadline, and I have no need to rule on that
2 particular issue.

3 You filed a Motion for Leave, you've cited the standard.
4 It's been opposed. I'm going to determine that.

5 All right. Let's move on to the last one. Each side gets
6 three minutes. I've heard enough this morning. And that's the
7 Motion for a Protective Order.

8 **MS. LISS-RIORDAN:** Yes.

9 **THE COURT:** Anything you want to add to your papers or
10 anything you want to emphasize?

11 **MS. LISS-RIORDAN:** I -- I want to emphasize that the
12 issue that is being presented here is an extremely important
13 one.

14 **THE COURT:** Aren't they all? I mean, that's what you
15 have said this morning.

16 **MS. LISS-RIORDAN:** They are. And this one no less
17 than any of the others.

18 As you can see, this -- there is an enormously heated
19 debate that is going on right now in this state regarding the
20 issue of how to determine which workers are properly classified
21 as employees and which are properly classified as independent
22 contractors.

23 What DoorDash has done through its action is trying to
24 influence its workers, I submit, its employees, to take
25 political action to advance DoorDash's view of the matter and

1 ask -- and encourage and support its employees to lobby the
2 legislature on its behalf in a way that is against their
3 interests in this case with them not even having notice of the
4 fact that this case has been filed and that taking such action
5 would impede their ability to pursue or have damages recovered
6 on their behalf.

7 And now I know DoorDash is going to make all these
8 arguments and has made all these arguments in opposition that
9 there can be no class action here and so this is all just moot,
10 but the point of it is that there are serious arguments that
11 are being raised, and even if Your Honor disagrees with me on
12 everything I have said, even if you compel arbitration, this is
13 an issue that can be brought to the fore eventually. Even if
14 Mr. Magana has to go to arbitration, even if the Court were to
15 reject my arguments and stay this case and order Mr. Magana to
16 arbitration, he could then proceed to arbitration, and then the
17 stay could be lifted, at which time he could proceed with his
18 arguments, perhaps on appeal, that this case should have been
19 allowed to proceed as a class action.

20 But while that is all happening, what DoorDash is trying
21 to do is undermine the putative classes' rights to even have
22 the claims that have been brought on their behalf in this case
23 by trying to get them to lobby the legislature to undo the case
24 law that protects them in this case and without even telling
25 themselves -- and as we've cited in our papers, there is

1 actually a California statute that prohibits employers from
2 attempting to influence their employees' political activities,
3 and that's not limited to partisan political activities.
4 Lobbying the legislature is the type of political activity that
5 employers cannot direct or oversee or encourage or influence
6 their workers.

7 And we're not in any way saying that DoorDash can't take
8 its views to the legislature directly. We're not trying to
9 interfere in any way with DoorDash's lobbying activities, but
10 it violates California law to allow DoorDash to influence its
11 own employees with respect to political activity.

12 And the reason this Court has --

13 **THE COURT:** And what --

14 **MS. LISS-RIORDAN:** -- jurisdiction under Rule 23(d) --

15 **THE COURT:** Excuse me.

16 **MS. LISS-RIORDAN:** Yes.

17 **THE COURT:** What California law is violated?

18 **MS. LISS-RIORDAN:** Yes. This is cited in our reply
19 brief, which is at --

20 **THE COURT:** Are you talking about the Labor Code
21 sections, 1101 and 1102?

22 **MS. LISS-RIORDAN:** Yes. Yes.

23 **THE COURT:** And those claims aren't pled.

24 **MS. LISS-RIORDAN:** Well, they're the basis, though,
25 for our Rule 23(d) motion. I don't -- the fact that California

1 law prohibits this does not require that to be pled in the
2 Complaint.

3 When we filed the Complaint, we didn't know that DoorDash
4 was going to do that. How could it possibly have been in the
5 initial Complaint?

6 When courts hear Rule 23(d) motions, it's always because
7 something happens while the case is ongoing. It's not
8 something that is in the Complaint.

9 The Rule 23(d) orders that you see are where defendants
10 have communications with class members that may influence their
11 rights in the case. Those are never pled in the Complaint, nor
12 could they be.

13 **THE COURT:** Okay. All right.

14 This is something you brought up in your reply brief so I
15 will want to hear from the defendants because you didn't --
16 this was not a basis for your -- not a basis that you relied
17 upon in your --

18 **MS. LISS-RIORDAN:** Right, right. Which is why --

19 **THE COURT:** Please, let me get my question out.

20 **MS. LISS-RIORDAN:** Yes.

21 **THE COURT:** I need you to articulate exactly what the
22 basis of the 23(d) request is. Is it based upon the so-called
23 notice that was contained in the email being confusing,
24 misleading, or somehow solicitous in a way it isn't permitted
25 to be or coercive? What exactly is the claim? It's a little

1 hard to tell because your theory seems to have changed between
2 your moving papers and your reply papers.

3 **MS. LISS-RIORDAN:** Okay. In the reply papers, we
4 added an additional argument, and by agreement of the parties,
5 we added this agreement -- we added this argument, and we
6 specifically stipulated to DoorDash filing a surreply so that
7 it could respond. So I have both arguments.

8 **THE COURT:** So does the reply argument supersede the
9 moving papers argument --

10 **MS. LISS-RIORDAN:** It adds to them. It adds to them.
11 I have reiterated the Rule 23 --

12 **THE COURT:** Articulate to me, then, what the basis of
13 this request is so that I understand it.

14 **MS. LISS-RIORDAN:** Okay. So there are two bases of
15 the request. There is Rule 23(d) and the case law that we have
16 cited in that the communications were -- they were misleading.
17 They did not provide complete information.

18 The Rule 23(d) cases in which courts have enjoined
19 defendants from communicating with class members -- for
20 example, the *County of Santa Clara* case and others -- have
21 found that when there are communications with putative class
22 members that would affect their rights in the action and they
23 don't provide information such as the fact -- what claims have
24 been brought on their behalf, what the legal theories are, how
25 to contact plaintiff's counsel if they have any questions about

1 their rights, those are considered by the courts to be
2 misleading communications, and corrective notice has been
3 ordered so that putative class members would understand the
4 other side of the story.

5 The fact that --

6 **THE COURT:** What's the other ground?

7 **MS. LISS-RIORDAN:** And the other ground is the
8 California Labor Code section cited in our reply brief that
9 prohibits employers from influencing their employees' political
10 activities, which is what this -- which is what this is, and
11 it's a further ground why under Rule 23(d), the Court has the
12 power to -- to enjoin this and to issue --

13 **THE COURT:** All right. I understand. Thank you.

14 She has taken more time. I will give you three minutes.

15 **MR. LIPSHULTZ:** Thank you, Your Honor.

16 It's very simple. First of all, if the Court compels
17 arbitration, there is no class action here so there is no basis
18 for a Rule 23(d) motion. The whole issue is moot.

19 Second, even if there were a basis for a 23(d) motion in
20 terms of there being a viable class action here, which there is
21 not, then plaintiff hasn't even attempted to satisfy the *Gulf*
22 *Oil* standard. There is no evidence in the record of confusion
23 or anything that is misleading.

24 23(d) orders are very serious orders that, as acknowledged
25 by the Supreme Court, necessarily violate somebody's First

1 Amendment right to free speech. They can't be entered on the
2 basis of counsel's say-so that something is misleading.

3 Courts hear evidence; courts have hearings. There is
4 extensive evidence presented in these types of cases where
5 courts decide whether a statement was misleading or coercive in
6 a manner that affects the litigation, and that's the other
7 problem here, is encouraging -- counsel started her argument by
8 explaining that there is a public policy debate going on in
9 this state right now about how to classify workers. Exactly,
10 Your Honor. DoorDash has a right to participate in that public
11 policy debate and a right to try to persuade other people that
12 it is correct on that issue. That's how democracy works. That
13 is the whole premise of the First Amendment.

14 If counsel doesn't like what DoorDash said about trying to
15 change the law, the way to solve that problem is to provide the
16 alternative viewpoint. It's not to stop DoorDash from
17 speaking. That is core First Amendment -- black letter First
18 Amendment law.

19 So the whole motion is completely unfounded. And really
20 Labor Code Sections 1101 and 1102 -- the fact that counsel
21 relies on those in her reply brief, just read those sections,
22 Your Honor. They have nothing to do with the conduct at issue
23 here.

24 The California -- the Northern District of California
25 explained with respect to Section 01 that courts

1 traditionally -- this is a quote from the *Smedley* case,
2 820 F. Supp 1227, 1230, Note 3:

3 "Courts have traditionally interpreted the statute,
4 Section 1101, as being intended to defend employees engaged in
5 traditional political activity from reprisal by their
6 employer."

7 There is no allegation here that DoorDash even -- first of
8 all, they are not an employer, but even if they were an
9 employer, there is no allegation that DoorDash is punishing
10 people for their political briefs. DoorDash is trying to
11 convince people to agree with DoorDash on an issue of public
12 importance. That's perfectly permissible and has nothing to do
13 with Rule 23(d), and the motion should be denied.

14 **THE COURT:** Thank you. The matter is submitted. I
15 have heard enough.

16 (Proceedings adjourned at 10:03 a.m.)
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CERTIFICATE OF REPORTER

I certify that the foregoing is a correct transcript
from the record of proceedings in the above-entitled matter.

DATE: Thursday, September 27, 2018

Pamela Batalo Hebel

Pamela Batalo Hebel, CSR No. 3593, RMR, FCRR
U.S. Court Reporter